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Feature Article

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At Last: The Illinois Appellate Court Formally Recognizes the Common Interest Exception to the Waiver of Privilege Rule

Illinois' narrow conception of the attorney-client privilege and work product doctrine led some to believe that an Illinois court of review would never formally recognize the confidentiality of communications about litigation strategies between parties aligned in litigation. But just as in the great Etta James song played at wedding receptions the world over, the Illinois Appellate Court, First District has come along and "at last" joined the majority of jurisdictions in recognizing protection for such communications.

Selby v. O'Dea

In *Selby v. O'Dea*, 2017 IL App (1st) 151572, the First District recognized what it described as the "common interest exception" to the waiver rule. The court framed the issue thusly:

> When parties on the same side of a lawsuit wish to strategize to defeat their common litigation opponent, they may meet together and share information that would otherwise be privileged under the attorney-client or work-product doctrines. A lawyer may share privileged information from his or her client with the other party's lawyer. One party may speak to the other party's lawyer. One client may speak to the other client, in the presence of the lawyers. When these communications occur, the parties risk waiving privileges because they are disclosing privileged information to third parties—the other client and the other client's lawyer. This case requires us to decide whether two codefendants to a lawsuit waived these privileges when they met and shared information about that lawsuit as part of a "joint defense agreement" they executed.

Selby, 2017 IL App (1st) 151572, ¶¶ 1-2.

Before the *Selby* decision, Illinois courts had suggested there was a common interest between parties that could support an exception to the attorney-client privilege, but had only addressed the doctrine on a few occasions. *See Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (1991); *Western State Ins. Co. v. O'Hara*, 357 Ill. App. 3d 509 (4th Dist. 2005); *Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652 (2d Dist. 2007).

In *Selby*, the plaintiffs filed a class action lawsuit alleging that attorney James O'Dea (O'Dea) was retained by State Farm Mutual Auto Insurance Company (State Farm) to represent them with respect to subrogation lawsuits and that O'Dea obtained fraudulent default judgments against the plaintiffs by "circumventing the State of Illinois [r]ules governing service of process." *Selby*, 2017 IL App (1st) 151572, ¶ 7. The plaintiffs sued State Farm for abuse of process, civil conspiracy, and malicious prosecution. *Id*. ¶ 9. The trial granted summary judgment in State Farm's favor and the plaintiffs appealed. *Id*.

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The plaintiffs' appeal was based on certain discovery orders the trial court entered that they claimed prevented them from properly responding to motions for summary judgment. *Id*. ¶ 11. At issue was whether communications between counsel for the State Farm and O'Dea were protected under the joint legal defense privilege recognized by the trial court and whether a privilege log was required for communications protected by that extension of the privilege. *Id*. ¶ 12.

The plaintiffs issued interrogatories that sought the identification of communications between defense counsel in the case. *Id*. ¶ 15. Because a response to the interrogatory would include communications between defendants' counsel that occurred after the plaintiffs' lawsuit was filed, the defendants objected on the basis that privileged discussions had occurred between defense counsel during the pendency of the litigation. *Id*. ¶ 16. The trial court sustained the objection and held that post-complaint communications were privileged from discovery. *Id*. ¶ 17.

On appeal, the appellate court recognized that a client waives the privilege to an otherwise protected communication when it is shared with a third party. *Id*. ¶ 34. The court then walked through the history of the protection State Farm sought. *Id*. ¶¶ 37-50. Inclined toward what it described as the modern trend, the court did not recognize a privilege but found that an exception to the waiver rule existed to protect the communications. *Id*. ¶ 40.

The court identified several reasons in support of its holding. *Id*. ¶¶ 51-54. First, the court found that the common-interest exception to the waiver rule would offer all parties better representation and that the alternative holding would tend to chill communications and cooperation between similarly aligned parties. *Id*. ¶ 51. Second, the rule encourages cooperation between co-parties which expedites trial and trial preparation. *Id*. ¶ 52. Third, the rationale for the exception and the attorney-client privilege is the same; to protect the free flow of information from client to attorney. *Id*. ¶ 53. Fourth, the court recognized that several state and federal courts, and certain secondary sources, already believed that Illinois law protected such communications among commonly aligned parties and their counsel. *Id*. ¶¶ 54-57.

In addition to these reasons, the court also found that recognizing the common-interest exception to the waiver rule was a logical extension of the *Waste Management* decision. *Id*. ¶ 63. Because the *Waste Management* decision takes an expansive view of the attorney-client privilege, so too does the recognition of the exception. *Id*. ¶ 64. After recognizing the common-interest exception, the court then turned to its scope. *Id*. ¶ 73. The court declined to adopt the Restatement (Third) of Law Governing Lawyers, Section 76, which recognizes that the exception applies to a "nonlitigated matter" or to recognize that the exception applies in pre-suit communications, leaving that decision to the Illinois Supreme Court. *Id*. ¶¶ 73-74.

The court did decide two important issues: 1) whether the common-interest exception requires alignment between the parties on all issues; and 2) which statements are covered by the exception. *Id*. ¶ 75. As to the first issue, the court held that perfect alignment between the parties is not required. *Id*. ¶ 83. Instead, the court held it is necessary "that the communications between the parties sharing the common interest be in furtherance of that common interest—that they be germane to that common interest." *Id*. As applied to the facts of the case, the court found that State Farm and O'Dea were sufficiently aligned to satisfy that standard. *Id*.

As to the second issue, the court found that lawyer-to-lawyer communications and communications between a party and the commonly aligned party's lawyer were protected. *Id*. ¶¶ 90-94. As discussed below, despite protection, communications between a party and another party's lawyer should be avoided. The court went even further, holding that party to party communications made for the purpose of facilitating the common interest pursuant to the joint defense agreement, and with counsel present, are protected by the exception. *Id*. ¶ 103.

The court summarized its rulings on what was and what was not protected by the exception as follows:

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> the common-interest exception to the waiver rule protects from disclosure to third parties those statements made to further the parties' common interest, pursuant to a common-interest agreement, (1) by the attorney for one party to the other party's attorney, (2) by one party to the other party's attorney, (3) by one party to its own attorney, if in the presence of the other party's lawyer, and (4) from one party to another, with counsel present.

Id. ¶ 104.

Essentially, the court took the most expansive view of the exception it could find. Lastly, the court then turned to whether a privilege log was required for the protected communications pursuant to Supreme Court Rule 201(n). *Id.* ¶ 107. On remand, the court directed the trial court to conduct an *in camera* review of the post-complaint communications document by document and stated that State Farm should be required to provide a privilege log to aid in that process. *Id.* ¶ 110.

Illinois Attorney-Client and Work Product Privilege Basics

With the *Selby* decision in mind, it is important to remember the basics of Illinois attorney-client and work product law to gain perspective on how expansive the decision is and to remember that caution should still be exercised before jumping into a joint defense agreement.

The general rule with respect to discovery is stated in the Supreme Court Rule 201(b)(1) heading: "Full disclosure required." Ill. S. Ct. R. 201(b)(1). In Illinois, Rule 201(b)(2) governs the assertion of privilege, stating in relevant part:

> All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.

Ill. S. Ct. R. 201(b)(2).

Under Illinois law, it is well established that the assertion of a privilege is the exception; not the rule. *See Golminas v. Fred Teitelbaum Const. Co.*, 112 Ill. App. 2d 445, 448-449 (2d Dist. 1969). "[I]n Illinois, we adhere to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit." *Waste Mgmt., Inc.*, 144 Ill. 2d at 190. Privileges are strongly disfavored under Illinois law. *In re Marriage of Daniels,* 240 Ill. App. 3d 314, 324-25 (1st Dist. 1992).

That is not to say, however, that Illinois courts will not find privileges to exist beyond those referred to in Rule 201(b)(2). *See People v. Ryan*, 30 Ill. 2d 456, 461 (1964) (finding existence of insurer-insured privilege); *FMC Corp. v. Liberty Mut. Ins. Corp.*, 236 Ill. App. 3d 355, 358 (1st Dist. 1992) (finding existence of accountant-client privilege based on state statute). Illinois courts usually narrowly construe assertions of attorney-client privilege and the work product doctrine. *Archer Daniels Midland Co. v. Koppers Co., Inc.*, 138 Ill. App. 3d 276, 278 (1st Dist. 1985).

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The Attorney Client Privilege

The attorney-client privilege is designed to protect from discovery documents that reflect communications made in confidence between lawyer and client. *Shapo v. Tires N' Tracks, Inc.*, 336 Ill. App. 3d 387, 393 (1st Dist. 2002). To be entitled to protection, a claimant must show that the statement originated in confidence that it would not be disclosed, was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential. *Rounds v. Jackson Park Hosp.*, 319 Ill. App. 3d 280, 285-86 (1st Dist. 2001).

Not every disclosure from client to attorney is entitled to protection. The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege. *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228-29 (2d Dist. 2006). Furthermore, the attorney-client privilege does not protect communications primarily regarding business advice. *CNR Inv., Inc. v. Jefferson Trust & Sav. Bank.*, 115 Ill. App. 3d 1071, 1076 (3d Dist. 1983). For the privilege to apply, the confidential communications must be primarily legal in nature.

With respect to corporate entities, Illinois employs a version of the control group test. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118-19 (1982). Under Illinois' formulation of the test, the following analysis applies:

> As a practical matter, the only communications that are ordinarily held privileged under this test are those made by top management who have the ability to make a final decision rather than those made by employees those positions are merely advisory. We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group.

Consolidation Coal Co., 89 Ill. 2d at 120 (internal citations omitted).

The control group test adopted by Illinois is contrary to the United States Supreme Court's ruling in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the United States Supreme Court rejected the control group test holding that the test "frustrates the very purpose of the privilege by discouraging communication of relevant information." *Upjohn Co.*, 449 U.S. at 392. Specifically, the Court concluded that the privilege extends to any employee who communicates with counsel at the direction of her superiors regarding matters within the scope of her duties. *Id.* at 394.

The Illinois Supreme Court has declined to follow *Upjohn* and instead continues to adhere to the more limited control group test because it believes that the control group test "strike[s] a reasonable balance by protecting consultations with counsel by those who are the decision makers or those who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery." *Consolidation Coal Co.*, 89 Ill. 2d at 118-119. The Illinois Supreme Court's emphasis on the disclosure of relevant information was paramount to its decision, while the United States Supreme Court's ruling rested on its desire for communication. This difference in approach is telling and instructive for the following analysis.

The threshold consideration is to determine whether an individual is a member of the control group. Under *Consolidation Coal*, a person is deemed within the control group if: (1) the agent served as an advisor to top management of the corporate client; (2) the advisory role was such that the corporate principal would not normally have made a decision without the agent's advice; and (3) the agent's opinion or advice in fact formed the basis of the final decision

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made by those with actual authority within the corporate principal. *Archer Daniels Midland Co.*, 138 Ill. App. 3d at 279. In addition, an employee who merely supplies information or facts to top management does necessarily place that individual in the control group. *Id.*

As applied, the Illinois rules allows for membership in the control group to be fluid. It is possible that an individual may be part of the control with respect to some issues, but not others. To determine who is and is not in the control group, Illinois courts look at the individual's role in the organization and not that individual's title. In *Knief v. Sotos*, 181 Ill. App. 3d 959, 964 (2d Dist. 1989), the court held that a head waitress and a bar manager were not in the control group with respect to litigation decisions, and therefore, their communications with counsel representing the restaurant/bar were not protected from disclosure.

To meet the burden of establishing that an individual is in the control group, the proponent of the privilege must supply facts to establish the basis for the assertion. In *Midwesco-Paschen Joint Venture for Viking Projects v. Imo Indus.*, 265 Ill. App. 3d 654 (1st Dist. 1994), the court considered whether a field service manager in charge of an allegedly defective product sold to plaintiff was in the control group. The court found that the manager was a member of the control group based on testimony which established that the manager had direct managerial responsibility over the subject product, and that advice from the manager was obtained with respect to liability for the subject product. *Id*. at 663; *see also Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr.*, 213 Ill. App. 3d 427, 431-432 (1st Dist. 1991).

The Work Product Doctrine

The work product doctrine protects "material prepared by or for a party in preparation for trial" that contains "theories, mental impressions, or litigation plans of the party's attorney." *See* Ill. S. Ct. R. 201(b)(2). Materials are protected if they are prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 591 (2000).

What constitutes "work product" under Illinois rules is narrower than what is protected from discovery in the federal system. *Milynarski*, 213 Ill. App. 3d at 432. Illinois only protects "opinion work product," *i.e.,* matter which discloses the theories, mental impressions or litigation plans of a party's attorney. *Id.* Examples of documents prepared "in preparation for trial" include:

> Memoranda made by counsel of his impression of a prospective witness, as distinguished from verbatim statements of such witness, trial briefs, documents revealing a particular marshaling of the evidentiary facts for presentment at the trial, and similar documents which reveal the attorney's "mental processes" in shaping his theory of his client's cause.

Monier v. Chamberlain, 35 Ill. 2d 351, 359-60 (1966).

Generally, where there is a mixture of unprivileged factual material and protected opinion work product such as "attorneys' notes and memoranda of oral conversations with witnesses or employees," these materials are not routinely discoverable unless the party seeking discovery can show that "it is absolutely impossible to secure the factual information from other sources." *Mlynarski*, 213 Ill. App. 3d at 433.

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Practical Suggestions Regarding Application of Common Interest Exception

To be in the best position to assert that documents and conversations shared with aligned parties are protected by the common-interest exception consider adhering to the following actions:

1. To the extent possible, communications should be between counsel for the parties. *U.S. v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). If necessary, any communications between counsel of one party and representatives of the other must be with individuals in the other parties' control group as defined by Illinois law. *Consolidation Coal Co.*, 89 Ill. 2d at 118-19.
2. All communications should be related to legal advice for the common goal of prevailing in the litigation, that is, a legal objective common to the parties and that also effectuates the common business interests of the parties. *People v. Adam*, 51 Ill. 2d 46 (1972).
3. No individuals beyond the counsel for the parties and the members of the control group for both parties should be the intended or actual recipients of any materials for which the attorney-client privilege or work product doctrine will be asserted. *Consolidation Coal Co.*, 89 Ill. 2d at 115-16; *Adam*, 51 Ill. 2d at 48.
4. Do not take notes of verbatim statements of potential witnesses. Instead, only make note or memoranda, including their impressions of the witness' testimony and his or her potential appearance as a witness. Illinois courts have created a very limited exception to the work-product doctrine for "rare instances" in which memoranda with attorneys' notes may be obtained even when those notes intermingle statements of witnesses and impressions of counsel. *See Consolidation Coal Co.*, 89 Ill. 2d at 111-10.
5. Any joint defense agreement should make clear that it is being entered into for the purposes of litigation and for protecting the communications between the parties and their counsel. *See Am. Legacy Found. v. Lorillard Tobacco Co.*, No. CIV. A. 19406, 2004 WL 2521289, at *4 (Del. Ch. Nov. 3, 2004).
6. Implement procedures for the exchange of documents between the parties to preclude their disclosure to individuals not entitled to the confidential documents. *See Tenneco Packaging Specialty and Consumer Prods., Inc.*, 1999 WL 754748 (N.D. Ill. 1999).
7. To the extent possible, communications in preparation of witnesses of one party by counsel for the other should be done without a written work product being exchanged in advance of those discussions. *See Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 665-656 (D. Neb. 1993);
8. Vet all documents that may be produced and evaluate if their protection from disclosure provides an unfair advantage to one of the parties in the litigation. *See Rayman*, 148 F.R.D. at 654-655; *Hewlett-Packard v. Bausch & Lomb*, 115 F.R.D. 308, 310-11 (N.D. Cal. 1987).
9. A confidentiality agreement should be executed by each individual who is to be party to the communications or to receive the documents sought to be protected under the "common interest." *See Tenneco Packaging Specialty and Consumer Prods., Inc.*, 1999 WL 754748, at *2.

The law surrounding the common interest exception to privilege will continue to develop as plaintiffs and defendants test the application and scope of the exception. While caution should be exercised, in multi-defendant cases joint efforts to defendant the plaintiff's claims may be the best tactic to obtain a successful outcome.

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